IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:	)	
	)	
STEVEN WISTUBA, D.C.,	)	Case No. 97-15340
	)	Chapter 7
Debtor.	)	
	)	
	)	
STEVEN WISTUBA, D.C.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adv. No. 02-5157
	)	
TEXAS GUARANTEED STUDENT LOAN CORPORATION,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

This matter is before the Court on Debtor Steven Wistuba's Adversary Complaint (Doc. 1) seeking an order that the student loan debt owed to the Defendant is dischargeable, because of undue hardship, pursuant to 11 U.S.C. § 523(a)(8)[1]. After hearing testimony and arguments of counsel, reviewing trial exhibits, and reviewing the written briefs of the parties, the Court is prepared to rule. The Court has jurisdiction to hear this matter as it is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

I. FINDINGS OF FACT

The Court makes the following findings of fact based upon the evidence presented by the parties:

[1]Unless otherwise noted, all future statutory references are to the United States Bankruptcy Code, 11 U.S.C. § 101 et seq.

1. Debtor financed his college education at Kansas State University, in part, with funds borrowed from the Defendant.

2. In addition to the loans from the Defendant, Debtor also borrowed funds from the United States, acting through the Department of Health and Human Services, in the form of Health Education Assistance Loans (HEAL), to finance his education at Cleveland Chiropractic College.

3. The HEAL loans are not at issue in this case, as they have been previously found to be non-dischargeable in Adversary Proceeding 98-5354 by a Consent Judgment entered March 16, 1999. That order granted judgment to the United States for $47,316.03, with interest at the rate of 4.918%. Debtor currently pays $100 per month on this debt.

4. Debtor owes approximately $88,961.44 to the Defendant, of which approximately $51,000 is principal.

5. The Defendant has agreed to eliminate any future interest on this debt and accept $300 per month for the next 25 years as payment in full.

6. Debtor is employed by Cessna Aircraft Company ("Cessna") in Wichita, Kansas and has a bi-weekly gross pay of $1,510.62, which results in net pay of $1,227.17 bi-weekly, or approximately $2,658.87 net pay per month.

7. Debtor's current rate of pay represents a $7,000 increase in gross salary over the past two years. Debtor has received nine raises during his five years of employment with Cessna, and he has been given increased responsibilities, which facts suggest that he is a valued employee of Cessna.

8. Debtor is in the process of obtaining a Master's Degree in Human Resources from Western University. Debtor is not required to personally pay the tuition for his course work, and is only required to pay for books, costing approximately $20 per month.

9. Debtor and his spouse have been married for approximately fifteen years. Debtor's spouse was aware of all his student loans when she married him.

10. Debtor's spouse is a Registered Nurse who works full time and earns $22 per hour. She nets approximately $3,300 per month, and she admitted she has no reason to believe her income will decrease in the foreseeable future.

11. In 2000, 2001 and 2002, respectively, Debtor received net income tax refunds of $2,000, $1,700 and $700.

12. At the time Debtor filed his bankruptcy petition in 1997, his schedules, which he signed under oath, indicated the monthly expenses for his family of five were approximately $3,376.

13. At the time of the trial in this case, Debtor claimed his monthly expenses had risen to $5,544, even though he testified his family circumstances had not significantly changed over that time, except for his children getting bigger.

14. In 2001, Debtor and his spouse purchased a new house, which increased his monthly house payment from $766 to $1292 per month.

15. Debtor apparently made a $27,000 down payment on this new home, as he testified the purchase price was $157,000 and the mortgage was $130,000. His former home was valued at $70,000.

16. Until a few months before this case was tried, Debtor had enough excess income to pay an additional $108 each month on his mortgage payment, which payment was not required by the terms of the mortgage. Thus, Debtor voluntarily made monthly mortgage payments of $1,400, instead of $1,292 as required by the mortgage.

17. At some point in 2000, Debtor and his spouse purchased a new vehicle, which almost doubled their monthly car payment, from $250 to $490.

18. Debtor claimed that his monthly medical expenses are currently $175 per month. However, Debtor admitted on cross-examination that the maximum out of pocket expenses he can be required to pay under his health insurance policy is $1,200 per year, or $100 per month, partly because he has no co-pay with his insurance, and his employer pays medical, dental, vision, life and disability insurance premiums for him.

19. Although Debtor's bankruptcy in 1997 was precipitated, at least in large part, by large medical expenses caused by the premature birth of a child, the child does not now appear to have significant medical needs requiring significant, or expensive, medical treatment.

20. At the time Debtor filed his bankruptcy petition, his family of five had a monthly food expense of approximately $550. At the time of the hearing on this matter, approximately six years later, Debtor claimed that the same family of five had a monthly food expense of approximately $1,450, which includes approximately $200 for meals outside of the house and an additional $150 for school lunches.

21. Debtor's explanation for the $900 increase in food expenses for his family of five, is that the children have grown and are now eating more than they did in 1997, and that the children's activities require the family to eat out more often.

22. In 1997, Debtor paid approximately $65 per month for telephone service. At the time of trial, Debtor was paying approximately $120 per month for telephone service. Debtor attributed the difference to the fact that the family now has two cellular telephones, which it did not have in 1997. The telephones are not required for Debtor's work, but are used for security while traveling on the highway and one of the cellular telephones is usually given to the children when they are away from home.

23. Debtor testified that he believed his family was living at least at a minimal standard of living at the time he filed for bankruptcy in 1997. Since that time, Debtor's monthly living expenses have increased more than $2,000.

Additional facts will be discussed below, when necessary.

II. CONCLUSIONS OF LAW

The Bankruptcy Code creates a presumption that student loans are non-dischargeable in the absence of undue hardship to the debtor or the debtor's dependents. 11 U.S.C. § 523(a)(8). The debtor has the burden of proving that the student loan is dischargeable. *See In re Lindberg,* 170 B.R. 462 (Bankr. D. Kan. 1994).

The majority of courts apply the test established by the District Court, and affirmed by the Second Circuit, in *Brunner v. New York State Higher Education Services Corp.*, 831 F.2d 395 (2nd Cir. 1987),

when deciding whether a debtor has met his burden of proving undue hardship. Under the *Brunner* test, Debtor must prove:

1) that he cannot maintain, based on current income and expenses, a "minimal" standard of living for himself and his dependents if forced to repay the loan;

2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loan; and

3) that he has made good faith efforts to repay the loan.

See In re Innes, 284 B.R. 496, 502 (D. Kan. 2002). Debtor must prove all three elements, and failure to prove any one element terminates the Court's inquiry, resulting in a finding of no dischargeability. *Id.*

The first prong of the *Brunner* test requires Debtor to demonstrate "more than simply tight finances." *Id.* at 504. The Court requires more than temporary financial adversity, but typically stops short of utter hopelessness. *Id.* "A minimal standard of living includes what is minimally necessary to see that the needs of the debtor and [her] dependants are met for care, including food, shelter, clothing, and medical treatment." *Id.* Further, a court should also be hesitant to impose a spartan life on family members who do not personally owe the underlying student loan, particularly when those family members are children. *Windland v. United States Dept. of Education (In re Windland)*, 201 B.R. 178, 182-83 (Bankr. N.D. Ohio 1996).

The second prong of the *Brunner* test requires "evidence not only of current inability to pay but also of additional, exceptional circumstances, strongly suggestive of continuing inability to repay over an extended period of time. . . ." *In re Innes*, 284 B.R. at 509 (citing *Brunner*, 831 F.2d at 396). Debtor

must show the Court such indicators as family dependents, medical problems, or limited education and job skills that would lead the Court to believe the he would be unable to repay the loan for several years. *Id.*

The third prong of the *Brunner* test requires the Court to determine if the debtor has made a good faith effort to repay the loan "as measured by his [or] her efforts to obtain employment, maximize income and minimize expenses." *Id.* at 510. A finding of good faith is not precluded by the debtor's failure to make a payment. *Id*. "Undue hardship encompasses a notion that the debtor may not willfully or negligently cause his own default, but rather his condition must result from factors beyond his control." *In re Faish*, 72 F.3d 298, 305 (3rd Cir. 1995).

Because the Tenth Circuit has not adopted the *Brunner* test, Debtor has asked the Court to follow a totality of the circumstances test adopted by the Sixth and Eighth Circuits. Under the test utilized by the Sixth Circuit, the Court looks at many factors, including those factors identified in *Brunner*, but also considers the amount of the debt, the rate at which interest is accruing, and the debtor's claimed expenses and current standard of living, with a view toward ascertaining whether the debtor has attempted to minimize his expenses and those of his dependents. *In re Hornsby*, 144 F.3d 433, 437 (6th Cir. 1998). The Eighth Circuit has also adopted a totality of the circumstances test that requires an inquiry into "the debtor's current and future financial resources, the debtor's necessary reasonable living expenses for the debtor and the debtor's dependents, and any other circumstances unique to the particular bankruptcy case." *In re Andresen*, 232 B.R. 127, 140 (8th Cir. B.A.P. 1999), *abrogated on other grounds by In re Long*, 322 F.3d 549 (8th Cir. 2003).

III. ANALYSIS

A. The student loan debt is not dischargeable under the *Brunner* test.

1. Debtor has failed to show that he cannot maintain, based on current income and expenses, a "minimal" standard of living for himself and his dependents if forced to repay the loan.

The first element Debtor is required to prove is that he cannot maintain, based on current income and expenses, a minimal standard of living for himself and his dependents if forced to repay the loan. The Defendant lender asks the Court to consider the family's monthly expenses and monthly net income, which result in more than a $400 monthly surplus, and find that Debtor can afford the $300 per month payment, without interest for twenty-five years, which the Defendant has agreed to accept as full payment of the debt. Debtor claims that the Court should not consider all his wife's income in the analysis, and find that he, individually, lacks the ability to repay the loans.

The majority of courts have held that a non-debtor spouse's income should be considered when deciding whether a debtor can afford to repay student loans. *See*, *e.g.*, *In re Barron*, 264 B.R. 833 (Bankr. E.D. Tex. 2001); *In re Dolan*, 256 B.R. 230 (Bankr. D. Mass. 2000); and *In re White*, 243 B.R. 498 (Bankr. N.D. Ala. 1999) (citing approximately 50 cases following this approach). This Court agrees. Based upon this majority view, Debtor can afford to repay his student loans when his spouse's income is considered. Debtor and his spouse together earn approximately $5,960 in net income each month, compared to monthly living expenses of $5,544. With tax refunds annually averaging $1,466 over the last three years, this adds essentially another $110 per month in income. This results in a surplus of over $500 per month. Thus, Debtor can clearly afford to repay the $300 per month student loan payment proposed by the Defendant.

Debtor also contends that the Court should follow the analysis used by Judge Pusateri in *Innes v. State of Kansas, et al. (In re Innes),* Adv. No. 95-7104 (Bankr. D. Kan. Dec. 22, 2000), and affirmed by Judge Crow, which only applied a proportionate share of the non-debtor spouse's income to be used to pay the family's monthly expenses. Judge Pusateri found that the facts and circumstances of the debtor and his spouse in *Innes* necessitated the apportionment of the family's income and expenses.

The Court finds that the facts of *Innes* are sufficiently distinguishable from the current case and that the majority approach, which considers the non-debtor's spouse's income, should instead be applied. None of the factors discussed by Judge Pusateri that led to his apportionment approach are present in this case. Therefore, the Court finds that it should follow the approach that has been widely accepted, which considers all of Debtor's spouse's income. Based on this finding, it is clear that Debtor has the ability to repay the student loans and that a discharge of that debt is not appropriate.

2. Debtor has failed to show, assuming he were currently unable to repay the loans, that this state of affairs is likely to persist for a significant portion of the repayment period of the student loan.

If the Court were to adopt Debtor's position as to the first element of his claim---that he is currently unable to repay the loans based on his proportionate share of the family's month expenses ---the debt would still not be dischargeable as Debtor has not shown that this state of affairs is likely to persist for a significant portion of the repayment period of the student loan. Utilizing the income and expenses proposed by Debtor, adjusted only to account for the discrepancy in the maximum month medical expenses for Debtor (which he admitted overstated his expenses by $75 per month), Debtor currently has a net income of approximately $2,600, can reasonably expect a proportionate share of the joint tax return to be at least $25 per month, and is responsible for his proportionate share of the monthly household expenses in the

amount of approximately $2,460. Therefore, using the figures proposed by Debtor, he currently has an excess income of approximately $165 per month.

Over the past two years, Debtor has had his pay at Cessna increased by approximately $3,500 per year. After adjusting for taxes, Debtor's pay increases have thus resulted in over $200 per month in additional net pay. Therefore, if Debtor continues to receive pay increases at the rate he has in the recent past, he would be able to make the $300 monthly payments on his student loan on pay raises alone. In addition, Debtor is making his earning potential even greater by obtaining a Master's Degree. Thus, the Court is convinced that Debtor's pay will likely continue to increase, especially given his level of education and job skills. Debtor, even without his spouse's entire income included in the calculation, currently falls only $135 per month short of being able to repay his student loans. It is highly unlikely that this situation is likely to persist for a significant portion of the repayment period of the student loan. Even if Debtor cannot repay the loans at this time, he has failed to show that he will not be able to repay them in the near future.

Debtor claims that the Court should consider the fact that he may be laid off at some point in the future as evidence that he will not be able to repay the student loans. Debtor produced no evidence that a layoff affecting him was imminent or even probable. Rather, Debtor relied on pure speculation that at some point in time, he might be laid off. He admitted that if he was laid off, based upon prior furloughs at Cessna, it would likely only be for a few weeks, and he would be able to obtain unemployment compensation. Debtor's speculation that he might be laid off is no different that a creditor's speculation

that a debtor may win the lottery or inherit a large sum of money in the future.[2] Without sufficient evidence showing the likelihood of an upcoming layoff that would definitely involve Debtor, his speculation that he may be without a job in the future is insufficient to support a finding of non-dischargeability of his student loans.

3. Debtor has not made a good faith effort to repay his student loans.

The final element Debtor must prove is that he has made a good faith effort to repay his student loans. As noted above, Debtor can show good faith by demonstrating he has made an effort to maximize his income while minimizing his expenses. *See In re Innes*, 284 B.R. at 509. The Court finds Debtor has failed to make a good faith effort to repay his student loans. There is little doubt Debtor has made a good faith effort to maximize his income, as he has had regular employment and is furthering his education in order to advance in his career. However, Debtor has made no visible effort to minimize his expenses, and in fact has greatly, and seemingly unnecessarily, increased his expenses since his bankruptcy petition was filed in 1997.

At the time Debtor filed for bankruptcy in 1997, his monthly household expenses for the family of five totaled $3,376. In the six years since, Debtor's household expenses for the same family of five has increased nearly 65%. Debtor purchased a new house, which raised his monthly mortgage payment $526 per month, and he purchased a new automobile, which raised his monthly car payment $240 per month. In addition, he chose to pay an extra amount on his monthly mortgage payment rather than use that sum

[2]Ironically, Debtor's spouse testified she did expect to receive an inheritance in the not too distant future. The Court did not consider that fact in making its decision.

to reduce his student loan debt. He also chose to make a $27,000 down payment on his new home purchase, an exempt asset, rather than using that money to repay his student loans.

In addition, Debtor claims that his monthly grocery costs have increased from $550 per month to $1,100 per month, plus $350 per month on top of that already large amount for school lunches and eating at restaurants. Debtor's only explanation for a more than 100% increase in food expenses is that his children are now older and eat more food.[3] A purchase of two family cell phones, a doubling of the family's clothing expenses, a doubling of the family's car expenses, and a tripling of their other transportation expenses are additional examples of how Debtor has failed to tighten his belt in an effort to repay his student loans.

It is abundantly clear that Debtor has not made any significant effort to minimize his expenses in order to repay his student loans. Debtor admitted that, with expenses of $3,376, he and his family were living at "at least a minimal standard of living" at the time he filed his bankruptcy petition. Rather than continuing to live at that level so that he could repay his student loans, Debtor continued to make additional purchases and incur significant additional debt. Had Debtor continued to live in the house he owned at the time he filed for bankruptcy in 1997, or maintained an automobile that had similar payments as the one he owned in 1997, he would easily have the necessary funds to repay his student loans, as those two purchases alone now cost Debtor and his spouse an additional $764 per month. The student loan

---

[3]Defendant has claimed that $1,450 per month for food is excessive, given the fact that the same family of five had a monthly food budget of $550 at the time Debtor filed for bankruptcy in 1997. Although the Court certainly questions the accuracy of this amount given the enormous increase since 1997, and whether it is a reasonable expenditure, the Court does not need to make a finding that the amount is excessive as such a finding would not change the outcome.

payments would be only $300 per month. However, Debtor apparently sought to increase his lifestyle by moving into a much more expensive home and driving a more expensive automobile rather than live within the means necessary to repay his student loan debts. The increased spending, in light of the large student loan debts, shows a lack of good faith on his part to repay those student loans. Therefore, the Court finds these loans are non-dischargeable on this basis as well.

B. The student loan debt is not dischargeable under the "totality of the circumstances" approach proposed by Debtor.

The Court will also address whether Debtor's student loans should be discharged under a totality of the circumstances test, approved by the Sixth and Eighth Circuits, and followed by Judge Crow in *In re Innes*.[4] This test requires the Court to consider Debtor's past, present and reasonably reliable future financial resources, Debtor's and his dependants' reasonable living expenses, and any other relevant factors and circumstances surrounding the case. Although the approach is much more flexible than the *Brunner* test followed by the majority of courts, it leads to the same result in this case.

When viewing the facts and circumstances of this case as a whole, it is clear to the Court that Debtor has not shown that repaying the student loans will cause an undue hardship on him or his dependents. As noted above, Debtor has made several choices after filing for bankruptcy, including purchasing a new home that raised his monthly mortgage payment over $525 a month, and purchasing a new vehicle that raised his car payment $240 per month. His food budget has increased over a 100% for

[4]The Court does not believe that adoption of the totality of the circumstances test is necessary, as the *Brunner* test has been widely accepted, and will, in all likelihood, be the test adopted by the Tenth Circuit Court of Appeals when it has the opportunity to rule on the issue. Because the issue has not been decided by the Tenth Circuit Court of Appeals, however, the Court will analyze the case under both approaches.

the same family of five. If Debtor was truly committed to repaying his student loans, he could have done so relatively easily, while still maintaining a reasonably comfortable lifestyle for himself and his family.

In addition, Debtor's monthly expenses, although not shocking, are far from frugal. The purchase of the new house and automobile, the purchase of two cellular telephones, and the enormous increase in food expense are all clear indicators that Debtor has placed more importance on improving his lifestyle than repaying his debts. Debtor's income, education and job history clearly show that he has the ability to repay the student loans if he were to exercise a small amount of control over his spending.

Debtor also claims that the Court should consider two additional factors in this case. First, Debtor is required to repay non-discharged HEAL loans he acquired while furthering his education. The Court finds that the HEAL loans have no impact on its decision. Debtor's current and reasonably anticipated future income are sufficient to repay both the HEAL loans, for which he presently pays only $100 per month, and the loans at issue in this case while maintaining even more than a minimal standard of living. This is especially true in light of Debtor's testimony that he intends to use the $27,000 equity in his home, created by the large down payment in this amount, to repay that debt.

Second, Debtor claims in his trial brief that he is dependent upon his wife's income to fund the family budget and that "[w]hether by death, divorce or voluntary withdrawal from the work force, Debtor's financial circumstances would change dramatically" if his wife did not work outside the home. The Court again finds that Debtor's speculation on this issue is insufficient to support a finding of non-dischargeability. She has worked steadily as an RN for over fifteen years, and no evidence was presented suggesting that Debtor's spouse is likely to die, divorce him, or voluntarily leave her job in the future.

Based upon all of the facts and circumstances in this case, the Court finds that repaying his student loans would not cause an undue hardship on Debtor or his dependents. Therefore, the Court finds the debt owed the Defendant is non-dischargeable.

IV. CONCLUSION

The Court finds Debtor has failed to show that his student loans should be discharged pursuant to 11 U.S.C. § 523(a)(8). Debtor has the ability to repay the loans when taking into account his wife's income. Were the Court to exclude his wife's income from its consideration, Debtor's current inability to repay the loans is not likely to continue for a considerable portion of the repayment period based upon his history of pay raises and his level of education, which is increasing. Finally, Debtor has not made a good faith effort to repay his loans, as evidenced by Debtor's failure to minimize expenses, including such things as purchasing a new home and a new automobile between the time he filed his bankruptcy petition and the time he sought to have his student loans discharged. In addition to failing to meet any of the three elements of the *Brunner* test, the facts of this case show that the debt would be non-dischargeable under a totality of the circumstances test, as well.

IT IS, THEREFORE, BY THIS COURT ORDERED that judgment shall be entered on behalf of the Defendant in this adversary proceeding. Debtor's student loan debts at issue in this matter are non-dischargeable.

IT IS FURTHER ORDERED that the foregoing constitutes Findings of Fact and Conclusions of Law under Rule 7052 of the Federal Rules of Bankruptcy Procedure and Rule 52(a) of the Federal Rules of Civil Procedure. A judgment based on this ruling will be entered on a separate document as required by Fed. R. Bankr. P. 9021 and Fed. R. Civ. P. 58.

IT IS SO ORDERED this 9th day of October, 2003.

JANICE MILLER KARLIN, BANKRUPTCY JUDGE
UNITED STATES BANKRUPTCY COURT
DISTRICT OF KANSAS

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the Memorandum and Order was deposited in the United States mail, postage prepaid on this 9th day of October, 2003, to the following:

Jeffrey L. Willis
JOHNSON, KENNEDY, DAHL & WILLIS
727 N. Waco, Suite 585
Wichita, Kansas 67203

N. Larry Bork
GOODELL, STRATTON, EDMONDS & PALMER, LLP
515 S. Kansas Avenue
Topeka, Kansas 66603

DEBRA C. GOODRICH
Judicial Assistant to:
The Honorable Janice Miller Karlin
Bankruptcy Judge